IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 253 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHESH JAGJIVAN SHAH - Appellant(s)

Versus

STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :

MS MEGHA JANI for Appellant(s) : 1,
MR RC KODEKAR, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE MD SHAH

Date : 25/11/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.This appeal under Sec.374 of the Code of Criminal Procedure has been filed by the

appellant original accused No.5 Mahesh Jagjivandas Shah against the judgment and order of conviction dated 19-2-1997 sentencing the appellant to undergo rigorous imprisonment for life and ordered to pay fine of Rs.5,000/- and in default of payment of fine, to suffer simple imprisonment for two and half years under Sec.302 of IPC and rigorous imprisonment for life and to pay fine of Rs.2,000/- and in default of payment of fine, to suffer simple imprisonment for one year under Sec.326 of IPC. Both the sentences were ordered to run concurrently.

2.The complaint in question was lodged by the injured complainant Vijay Bhavanbhai Thakore, son of the deceased, with Navrangpura Police Station on 6-11-2002 against the present appellant and others alleging that on 5-11-1992 at about 8.30 a.m. when the complainant along with all accused were standing near Gayatri Pan Centre situated very near to Tulip Society

Block No.136, the accused hatched a conspiracy with a common intention to kill the complainant. There were exchange of words between them and scuffle took place thereafter between the present appellant and the complainant. In the meanwhile, the father, mother, brother and sister of the complainant came to the scene of offence as distance between the scene of offence and their residence is about 50 feet. When the appellant was giving two knife blows to the complainant, father of the complainant i.e. deceased Bhagvanbhai tried to intervene. The appellant gave three knife blows on the vital part of Bhagvanbhai and thereafter they ran away from scene of offence. A member of the said society namely, one Bupendrabhai came with rickshaw and took the injured and deceased to the hospital where they were admitted as indoor patients. During the course of treatment, Bhagvanbhai succumbed to the injuries. Hence, the complaint

was registered and investigation started. During the course of investigation, except the appellant, other four accused were arrested and at the end of investigation, charge sheet was submitted within stipulated time against those four accused showing the present appellant as absconding accused in column No.2 of the charge sheet. The present appellant was absconding for a considerable period of about two years. He was arrested on 8-8-1994 and was sent to judicial custody and a supplementary charge sheet was filed against him. The case was committed to the Sessions Court, Ahmedabad (Rural) at Mirzapur, and numbered as Sessions Case No.216 of 1994. As the case qua other four accused was numbered as Sessions Case No.110 of 1994, both the cases were transferred into the court of learned Addl. Sessions Judge, Ahmedabad(Rural), Mirzapur for trial. As both the sessions cases arose from the common offence, with the consent of the accused,

common evidence was recorded and heard together. At the end of trial, the impugned judgment and order of conviction has been delivered by the learned Addl. Sessions Judge, Ahmedabad (Rural), Mirzapur whereby four accused were acquitted while the present appellant was convicted, which is giving rise to the present appeal.

3. Being aggrieved and dissatisfied with the above judgment and order of conviction, the present appeal has been preferred by the appellant.

4. We have heard learned counsel for the appellant, Ms.Megha Jani and learned APP for the State, Mr.R.C.Kodekar.

5. Learned counsel for the appellant has restricted her arguments only on the point of defense. In short, she has not disputed rest of the judgment and therefore, we have heard her on that point only. At the end of arguments, she has requested that at the most the offence may be considered as the one under Sec.304 Part

II since there was no intention on the part of the appellant to kill the deceased.

6.Ms.Megha Jani has taken us through the evidence of various witnesses namely, Vijay Bhavansinh Thakore who has been examined as P.W.No.1 at Ex.17 who is the injured complainant. It is through him the complaint Ex.18 has been proved. She has also taken us through oral evidence of brother of complainant, Ajaybhai Bhavansinh, who has been examined as P.W.No.2 at Ex.19, Parvatiben Bhavanbhai as P.W.No.6 at Ex.39, the mother of the complainant and widow of the deceased. She has also relied upon the evidence of sister of the complainant, Rupalben Bhavanbhai Thakore, who has been examined as P.W.No.5 at Ex.38 and also towards the evidence of brother of the complainant and daughter of the deceased mainly on the ground that they are witnesses related of the deceased. She has also taken us through oral evidence of other witnesses namely,

Yogesh Bhupendrabhai Shah who has been examined as P.W.No.3 at Ex.24; Bhupendrabhai Bhikhalal Shah as P.W.No.7 at Ex.40 and Shailesh Bachubhai Prajapati as P.W.No.4 at Ex.37 and argued that they are independent witnesses. Out of these three witnesses, she has placed reliance upon the evidence of Bhupendrabhai Bhikhalal Shah, the person who took the deceased and injured into the hospital for treatment in his rickshaw. According to her, there is no reason to disbelieve the say of this witness. It is through the evidence of this witness that she has tried to establish the point of self defense. She has also taken us through the evidence of Dr.Harish Devchandra Pali, P.W.No.8 Ex.41, the doctor who performed post mortem on the body of the deceased as well as Dr.Miteshbhai Kalabhai Garasiya, P.W.No.9, Ex.44 through whom prosecution could prove the bodily injury received by the injured complainant.

7.It is the main argument advanced by her that prior to the main incident, there were altercations between the appellant and the complainant as a result of which, father, mother, brother and sister of complainant came on the spot and therefore, in self defense, the appellant has taken out rampuri knife from his pocket and while doing so, three injuries have been received by the deceased. Even the complainant has also received two injuries. It is argued that just for the purpose of saving his own life and as a last resort, the appellant has used the knife. In this connection, she has relied upon the case of Laxman Singh Vs. Poonam Singh and others, 2004(10) SCC page 94 more particularly towards part of paragraph No.10 which reads as under:

> “Though acquittal in respect of offence punishable under Section 447 IPC is not always determinative of the question whether the right of private defence has been exceeded in a given case, the same assumes importance as in the present case. It has been significantly noted by both the courts below that the attacks were not

> premeditated. On the contrary, for several hours, the parties were discussing their respective stands (may be with some amount of verbal aggression), and that aspect has indelible importance while assessing the basic issue regarding exercise of the right of private defence."

8. Learned counsel for the State, Mr.R.C.Kodekar, has mainly taken us through the evidence read out by the learned counsel for the appellant into the court and argued that there is no reason to disbelieve say of the above referred witnesses. The presence of the accused on the spot has not been disputed by the otherside. Said fact has been established through the evidence of witnesses also. The complainant received two severe injuries of knife, the deceased received three severe injures and others also received injuries and therefore, according to him, it cannot be said that the complainant was not there on the spot and is a got up complainant. He has also taken us through the relevant evidence of witnesses and argued that it was 8.30 p.m. on the day

following Diwali and house of the victim is very near to the above referred pan galla. According to him, as there were some shouts, family members are bound to come out because of curiosity. Above referred fact has been admitted by the eye witnesses also.

9. Mr.Kodekar has taken us through oral evidence of three witnesses relied upon by the learned counsel for the appellants. On showing us the injury certificate as well as column No.17 of the post mortem report, it is argued that none of the injuries are possible by wielder of knife and it is an injury on the vital part of the body which is possible if weapon is veiled in air. All the witnesses were thoroughly cross-examined by the learned counsel for the appellant into the court below. He has taken us through the further statement as well as the written explanation submitted by the appellant into the court below and argued that it is not a self defense as there are no evidence on

record. Even nothing has been recovered on the spot though accused were having deadly weapons in their hands at the relevant time. He has again taken us through the oral evidence and the cross examination of witnesses and not a single suggestion has been put to any of the witnesses to the effect that they were having knife or deadly weapon in their hands making the appellant to use the weapon in question to save himself and hence, according to him, it is not a case of self-defense. Looking to the weapons used in the commission of offence and the nature of injuries sustained by the deceased and other evidence on record, it will not fall under the provisions of Sec.304 part II.

10. We have gone through the evidence shown to us by the learned counsel for the respective parties along with the documentary evidence namely, post mortem note Ex.18, injury certificate of the complainant, etc. Column

No.17 of the post mortem is very clear that all the three injuries received by the victim are injuries of knife recovered from the accused and it has been proved by the evidence of doctor.

11.We entirely agree with the arguments advanced by learned APP for the State that the type of injuries received by the deceased would not have been possible by wielding knife in air. It is a wound reaching upto the lungs. Not only that, even the injuries received by the complainant are such which can also be said to be not the injuries possible by wielding of knife. Even no suggestion to that effect has been asked to any of the witnesses in cross-examination. Not only that, we have minutely gone through the evidence on record and nothing has been established to show that the otherside were having deadly weapons in their hands or the situation was such that for the purpose of saving his own life, he has no alternative but

to use the knife in his hand. It is established that he is not the resident of that area. However, some previous incident had taken place wherein son of the deceased has been beaten by them and after 5 days, he was called there and at that time, along with the appellant, other accused were there with the weapons and, therefore, their intention was clear from the beginning and therefore, motive is also established. Apart from the above, as the parties were known to each other, question of misidentification does not arise at all. In absence of all the aforesaid, when prosecution is able to prove the injury sustained, weapons used and also the fact that the accused remained absconding for a period of two years, it cannot be said to be a case of self defense. Law on the self defense is also clear as to when the benefit of self defense can be given. It is also required to be seen whether the person has exceeded his limit or not. Here in

this case, there is no evidence worth the name to come to a prima facie conclusion that it is a case of self defense and, therefore, discussion further qua the law on self defence does not arise.

12.As far as the reliance placed by the learned counsel for the appellant on the law laid down by the Apex Court in (2004)10 Supreme Court Cases 94 is concerned, there cannot be any dispute regarding the same. However, as we have stated earlier, there are no evidence worth the name for slightling believing that it is a case of self defense but we can say that it is a prearranged plan on the part of the appellant and other accused and, therefore, they came at the scene of offence along with the knife and other deadly weapons and assaulted the complainant and when father of the complainant tried to intervene, he was also severely assaulted as a result of that, incident in question has taken place. Therefore, the

incident in question cannot be viewed lightly. It appears that State has not preferred any appeal against the acquittal of other four accused and therefore, we are not discussing anything in that regard. No other points were argued by the learned counsel for the appellant.

13.We are not discussing the evidence of each witness in detail in view of the observations made by the Hon'ble Apex Court in the case of STATE OF KARNATAKA VS. HEMAREDDY reported in AIR 1981 SC 1417 which reads as under:-

> "..... This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudry (1967) 1 SCR 93: (AIR 1976 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will

ordinarily suffice."

14.In view of the above, this appeal is required to be dismissed.

15.The appeal is dismissed.

(R.P.DHOLAKIA,J.)

(M.D.SHAH, J.)

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